

June 25, 2010

**CC Docket No. 02-06**  
**CC Docket No. 96-45**

**VIA ELECTRONIC FILING**

Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Appeal of Administrator's Decision: Request for Expeditious Review**

Re: Request for Review in Response to the Administrative Decisions issued by the Universal Service Administrative Company's Administrator on April 26, 2010 denying appeals filed by Achieve Telecom of Commitment Adjustment Letters ("COMADs") dated September 8, 2008; October 31, 2007; and, January 14, 2009 in connection with school districts Chelsea, Springfield, Brockton and Somerville, Massachusetts and a FCDL dated December 10, 2008 in connection with a funding request of Somerville, Massachusetts for Funding Year 2008.

The Funding Request Numbers at issue in this appeal are the following:

Funding Request Number(s):

1. 1381110 Chelsea Massachusetts Public Schools; BEN: 120548
2. 1232738 Chelsea Massachusetts Public Schools; BEN: 120548
3. 1590640 Brockton Public School District (MA); BEN: 120639
4. 1754095 Brockton Public School District (MA); BEN: 120639
5. 1416498 Brockton Public School District (MA); BEN: 120639
6. 1490940 Springfield Massachusetts School District; BEN: 120089
7. 1595241 Springfield Massachusetts School District; BEN: 120089
8. 1207981 Springfield Massachusetts School District; BEN: 120089
9. 1352672 Springfield Massachusetts School District; BEN: 120089
10. 1175002 Somerville Massachusetts School District; BEN: 120536
11. 1421087 Somerville Massachusetts School District; BEN: 120536
12. 1257549 Somerville Massachusetts School District; BEN: 120536
13. 1688549 Somerville Massachusetts School District FCDL; BEN: 120536

In response to the referenced Funding Request Number(s) and to the Administrative Decision(s) ("AdDecs") all issued by the Administrator on April 26, 2010, Achieve Telecom Network of Massachusetts, LLC ("Achieve"), Service Provider Identification Number ("SPIN") 143026761 hereby files this Appeal directly to the Federal Communications Commission for full review and reversal of each and every one of these decisions. AdDecs are cited in this Appeal but are not provided as Exhibits; however, if needed, Achieve can provide a copy of all AdDecs.

**I. BACKGROUND INFORMATION ON APPEAL**

**A. Background On Achieve**

Achieve is a Massachusetts-based company that has been designated by USAC as an Eligible Telecommunications Provider for purposes of participation in the Schools and Libraries

Support Mechanism administered by the SLD ("E-Rate Program" or "Program"). Achieve provides E-Rate Program eligible digital transmission services employed in delivering distance learning circuits to K-12 public schools. Achieve has participated as a service provider in the E-Rate Program since 2004 and has offered its digital transmission services pursuant to a tariff filed with the Massachusetts Department of Telecommunications and Energy as well as contract arrangements. As noted above, this Appeal relates to thirteen (13) Administrative Decisions issued by the Administrator on April 26, 2010.

**B. The Funding Requests at Issue in the Administrative Decisions**

The relevant background information regarding the Funding Requests, which are the subject of this Appeal are as follows:

<b>Springfield Public Schools</b>	
Funding Year 2004	
SPIN	143026761
Form 471 Application Number	433768
Billed Entity Number	120089
FRN	1207981
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008
Funding Year 2005	
SPIN	143026761
Form 471 Application Number	487623
Billed Entity Number	120089
FRN	1352672
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008
Funding Year 2006	
SPIN	143026761
Form 471 Application Number	538332
Billed Entity Number	120089
FRNs	1490940
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008
Funding Year 2007	
SPIN	143026761
Form 471 Application Number	577110
Billed Entity Number	120089
FRN	1595241
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008

<b>Brockton Public School District</b>	
Funding Year 2006	
SPIN	143026761
Form 471 Application Number	514834
Billed Entity Number	120639

FRN	1416498
Original COMAD issued	1/14/2009
Appeal filed:	03/10/2009
Funding Year 2007	
SPIN	143026761
Form 471 Application Number	575224
Billed Entity Number	120639
FRN	1590640
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008
Funding Year 2008	
SPIN	143026761
Form 471 Application Number	614875
Billed Entity Number	120639
FRN	1754095
Original COMAD issued	10/31/2008
Appeal filed	12/28/2008

<b>Somerville Public School District</b>	
Funding Year 2004	
SPIN	143026761
Form 471 Application Number	425096
Billed Entity Number	1200536
FRN	1175002
Original COMAD issued	9/08/2008
Appeal filed	11/07/2008
Funding Year 2005	
Achieve SPIN	143026761
Form 471 Application Number	455467
Billed Entity Number	1200536
FRN	1257549
Original COMAD issued	1/14/2009
Appeal filed	03/10/2009
Funding Year 2006	
SPIN	143026761
Form 471 Application Number	516499
Billed Entity Number	1200536
FRN	1421087
Original COMAD issued	1/14/2009
Appeal filed	03/10/2009
Funding Year 2008	
SPIN	143026761
Form 471 Application Number	613046
Billed Entity Number	1200536
FRN	1515053
FCDL Denial issued	12/10/2008

FCDL Appeal filed	02/06/2009
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<b>Chelsea Public School District</b>	
Funding Year 2005	
SPIN	143026761
Form 471 Application Number	447884
Billed Entity Number	120548
FRN	1232738
Original COMAD issued	1/14/2009
Appeal filed	03/10/2009
Funding Year 2006	
SPIN	143026761
Form 471 Application Number	502263
Billed Entity Number	120548
FRN	1381110
Original COMAD issued	1/14/2009
Appeal filed	03/10/2009

**C. Background on the United States Distance Learning Association and the Digital Divide Fund**

The USDLA is a non-profit corporation headquartered in Massachusetts. Its members consist of telecommunications providers, manufacturers and providers of equipment to the distance learning industry and interested non-profit organizations (e.g., universities and community colleges), including a number of companies that participate in the E-Rate Program (e.g., Tandberg, Polycom). It is governed by a Board of Directors and an Executive Committee and its Chief Executive Officer is John G. Flores.

USDLA has established a fund named the Digital Divide Fund to issue grants to schools to support the development and deployment of distance learning networks. A description of the Digital Divide Fund is on the USDLA website at [www.usdla.org](http://www.usdla.org).

**D. FCC Rules and USAC Programmatic Guidance Regarding Grants To Cover Applicant Share of Costs of E-Rate Program Supported Services**

The FCC has identified grants or donations to E-Rate Program applicants as a permissible source of the resources that an applicant must demonstrate that it has in order to receive E-rate Program support (i.e., the applicant's non-discounted share). However, there is no FCC rule or other policy statement that addresses the matter of such grants.

The SLD provides general guidance on grants on its web site. First, in addressing applicants' "Obligation to Pay Non-discount Portion," the SLD web site guidance states the following:

Some service providers offer to help applicants locate grants to pay for their non-discount portion. Program rules do not restrict applicants from accepting grants from bona fide organizations; nor do they restrict service providers from attempting to help applicants obtain grants from such organizations, so long as the grants or organizations are independent of the service provider.

Second, in providing a "Free Services Advisory," the SLD web site guidance states, by way of example, the following:

Example 7: A service provider donates funds to a grant organization, earmarked for an applicant.

Assume that an applicant that qualifies for an 80% discount seeks an eligible technology upgrade that costs \$100,000. The service provider donates \$10,000 to a grant organization, with a stipulation for how the funds are to be disbursed in a way that violates program rules. For example, the stipulation could indicate that funds are to be disbursed to a particular school that has a funding request under the Schools and Libraries Program that cites that service provider. Because of the additional transaction involving the grant, the cost of the service is not truly \$100,000. A funding request for the full \$100,000 pre-discount cost is a violation of program rules.

Achieve is aware of no other formal guidance or publicly available statement of policy by USAC or SLD on the subject of grants.

## **ARGUMENT**

### **Procedural Introduction**

The Administrator issued thirteen separate AdDecs all of which Achieve is now appealing. The basis for all thirteen decisions is essentially the same. In the first part of the argument set out below that common shared basis is challenged in detail. However, in the AdDecs denying Achieve's appeals of the four (4) Springfield COMADs and the three (3) Somerville COMADs and the Somerville FCDL, the Administrator also based the determination on findings specific to each city. In the second part of the argument, each of these city-specific findings is challenged in detail.<sup>1</sup>

### **Part 1: The Common Issues**

#### **I. The Administrator has No Evidence of Any Partnership or Other Illicit Relationship between Achieve and USDLA**

In all of the AdDecs, the Administrator makes a finding concerning an illicit relationship between Achieve and USDLA. This finding is based in each case on the same factual determinations. Each of these subsidiary factual determinations is wholly unsubstantiated and, for that reason alone, the overall finding of an illicit relationship has no basis. Moreover, review of the process by which the Administrator has made several of these subsidiary findings raises fundamental procedural due process concerns.

#### **A. Achieve is Not a Member of USDLA and such a Finding, as well as any further Findings Based thereon, is Arbitrary and Capricious**

Review of all twelve COMADS and the FCDL establishes that at no point was there any allegation set out in any of them that Achieve was a member of USDLA. Therefore, in none of the several appeals filed by Achieve between November, 2008 and March 2009 in response to these SLD administrative orders was this factual proposition addressed. Exhibit 1 (Achieve Appeal dated March 10, 2009 without exhibits except for copy of bid documents). In each AdDec, however, there appears this statement:

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<sup>1</sup> To the extent that the Administrator tacitly or expressly relies on the City-specific findings made in the AdDecs regarding Springfield and Somerville for support of the findings regarding Chelsea and Brockton, Achieve intends to incorporate the discussion set out in the second part of the argument below as part of its appeal of all of the AdDecs. Achieve presents its argument in this fashion as an administrative convenience in light of the number of separate decisions at issue.

In response to an information request, USDLA CEO John G. Flores specifically named Achieve as one of the members of USDLA.... The information received from Dr. Flores directly conflicts with Ms. Jackson's statements that "Achieve is not a member of USDLA."

Each AdDec cites an April 3, 2008 email from Flores to Jennifer Baumann to support this subsidiary finding that Achieve is a member of USDLA (the "Flores Email"). (This email is attached here as Exhibit 2). Each AdDec cites Joy Jackson's July 17, 2008 letter to Jennifer Cerciello as the source of the quoted statement from Ms. Jackson (the "Jackson Letter" see Exhibit 3). The statements set out in the Jackson Letter are incorporated as if set forth herein.

Before examining the form and content of the Flores Email and the Jackson Letter, several points need to be highlighted. First, both the Flores Email and the Jackson Letter were received by USAC-SLD prior to its issuance of any of the COMADs or the FCDL, yet, as noted above, there is no mention in any of these orders as to Achieve's purported membership in USDLA, and no mention of the Flores Email. Obviously, since there is no mention of these matters in the COMADs or the FCDL, Achieve was given no notice and opportunity in its appeal materials to address them. Yet, in each AdDec, after discussing the Flores Email and the Jackson Letter, the Administrator states that Achieve "has not refuted Dr. Flores' or the USDLA statements regarding ... Achieve's relationship with USDLA."

This procedural unfairness is only heightened by the following considerations. After receiving several of the COMADS but before submitting all of its appeals, Achieve filed an official FOIA request in October, 2008 seeking, *inter alia*, all of the information on which USAC-SLD relied in finding an illicit relationship between Achieve and USDLA. Achieve's FOIA Request is Exhibit 4. Obviously, this would include the Flores Email since in the AdDecs this Email is quoted (though selectively as noted below) and cited. Yet, even though the Administrator clearly relies on the Flores Email and did not hesitate to make selective portions of it public, the Flores Email was withheld from production in response to the FOIA request. Notwithstanding this fact, the Administrator finds that Achieve has failed to rebut or refute the Flores Email in its appeal submissions.

From the text of the Email and the communication to which it was a response (both of which Achieve has independently procured) it is clear that Flores was not asked whether Achieve is a member of USDLA. The "information request" states:

The SCR team has reviewed Funding Year 2007 E-Rate applications for some entities that indicated in their budget documentation that a portion of the costs are covered by grants from USDLA. As such, we need to have a clear understanding as to how your grant program works. We did review your website, however, although there seemed to be information regarding awards, we did not see information regarding grants offered. As such, it would be helpful if you could provide some general information regarding your grant program.

Additionally, SCR is aware that Achieve Telecom Network of MA, LLC currently has customers who use USDLA grants to support their budgets.

March 31, 2008 letter from J. Baumann to John G. Flores. (Exhibit 5) In response to this Flores stated:

In response to your inquiry about the USDLA Digital Divide Fund, the following is in response to your questions.... We are fortunate that many companies who have an

interest in e rate opportunities with school districts across the country are members of USDLA. In particular, Polycorn, Tandberg, Aretha and Achieve are just a few....

Exhibit 2. This is significant because Flores was simply wrong that Achieve is a member of USDLA and USAC-SLD received Jackson's sworn statement contradicting Flores several months later. In a June 21, 2010 statement addressed to USAC, Flores states that Achieve "has never been a member or sponsor of USDLA...." Exhibit 6. Yet, even though Flores was not even asked whether Achieve was a member of USDLA, and his information was contradicted later by Jackson's sworn statement, USAC-SLD never followed up with Flores or USDLA to verify whether Jackson was indeed correct.

The Flores' Email was received in April, 2008 and several months later the USAC-SLD received the Jackson Letter. The "conflict" in these two statements referenced by the Administrator, therefore, was known to USAC-SLD before it issued a single COMAD. Yet, USAC-SLD made no effort to clarify this "conflict" and, as noted above, no COMAD made any reference to a finding that Achieve was a member of USDLA. Moreover, no further inquiry was made by the Administrator during the 18 months that the appeals from the COMADs were pending. Nonetheless, the Administrator actually makes a finding that Achieve did not refute or rebut Flores' statements regarding the relationship between Achieve and USDLA. This finding is manifestly wrong and should be reversed.

**B. Achieve has no Illicit Partnership with USDLA and there is no Substantive Evidence for this Finding Identified by the Administrator**

Each COMAD at issue expressly stated that Achieve has an illicit partnership with USDLA. Moreover, prior to the issuance of the COMADs, USAC-SLD's Special Compliance Review sent an "information request" to Achieve on July 10, 2008 (the "Achieve Information Request") specifically inquiring about this purported "partnership" and citing certain statements on USDLA's website as the basis for this inquiry. Exhibit 7.

The Achieve Information Request states:

The USDLA website, [www.usdla.org](http://www.usdla.org), states the following in the USDLA CEO's Annual Report for 2006:

- "Grants: Continued partnership with Achieve Telecom to assist in pursuit of E-Rate K-12 monetary allocation with various technology companies which creates a revenue stream for the association.
- Digital Divide Fund: Created Digital Divide Fund to solicit monetary support for K-12 distance learning network projects.
- Revenue Sources: The majority of all revenue sources for USDLA are the direct result of initiatives and relationships within the distance learning industry. Corporate and Higher Education continue to be USDLA's major contributors."

Exhibit 7. Based on these statements, Special Compliance Review asked Achieve to explain why it was not in violation of program rules. The Jackson Letter was the detailed response to this Information Request.

As noted, the Information Request was in July 2008. An earlier so-called information request to USDLA had been sent in March 2008. Remarkably, **neither in March nor apparently at any other time** did Special Compliance Review send a parallel request to Flores or USDLA inquiring as to what the statements on its website were intended to mean. Even after receipt of the sworn statements in the Jackson Letter, Compliance Review apparently never

queried USDLA as to what the statements on its website were intended to communicate. Even after receipt of the Achieve Appeals which expressly rely on the Jackson Letter, cite other instances in which the USDLA website refers to “partnerships”, and otherwise establish the complete absence of any real evidence of “partnership” (as opposed to the casual use of that word on a website) apparently no inquiry was sent to Flores or USDLA regarding this issue during the 18 months the Achieve Appeals were pending. In essence, this course of conduct represents a determined refusal by USAC-SLD and its Administrator to find out the facts.

In the AdDecs, the Administrator misleadingly represents that Flores and USDLA in some fashion contradicted the sworn statements in the Jackson Letter regarding the complete absence of any “partnership” between Achieve and USDLA. For example, the Administrator states as follows:

SLD is aware that Achieve maintains that there is no formal partnership between itself and USDLA. However, SLD routinely tests service providers’ statements and certifications in order to protect program integrity. Statements that a partnership does not exist between Achieve and USDLA conflict with statements that were obtained from USDLA during the Special Compliance Review.

Chelsea AdDec at 3-4. ***In fact, Special Compliance Review apparently did not inquire in any way of either Flores or USDLA concerning a “partnership” between Achieve and USDLA.*** Again, it appears that there was ***no inquiry*** of Flores or USDLA concerning the issue of an Achieve partnership before the Jackson Letter, ***none*** after the Jackson Letter, ***none*** before the issuance of the COMADs, ***none*** after the Achieve Appeals. The Administrator states that SLD “routinely tests service providers’ statements and certifications.” The implication could not be clearer: after receipt of the Jackson Letter in July 2008 (which was a service provider statement with a certification), SLD “tested” Jackson’s sworn statements by obtaining information from USDLA concerning the Achieve partnership. ***But this never happened.*** There appears to be no information request at any time to Flores or USDLA concerning an Achieve partnership.<sup>2</sup>

In this light, the degree to which the Administrator must necessarily distort and selectively quote from the Flores Email becomes clear. The Administrator quotes the Flores Email as follows:

In response to an information request, [Flores] specifically named Achieve as one of the members of USDLA and noted that USDLA was “fortunate that many companies who have an interest in e rate opportunities with school districts across the country are members of USDLA.” Dr. Flores also explained that as USDLA “solicit[s] donations from philanthropic groups or private donations, [it] work[s] with [school] districts attempting to support what the e rate monies allow them to do. Achieve as a Massachusetts based company has taken advantage of this opportunity.”

After citing the Flores Email in this fashion, the Administrator, returning to the same website information contained in the Achieve Information Request of July 2008 almost 2 years earlier, finds that “Achieve has not refuted Dr. Flores’ or the reported USDLA statements regarding the grant program and Achieve’s relationship with USDLA.”

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<sup>2</sup> The “information” – other than what appears on the USDLA website – relied on by the Administrator all comes from the Flores email which is dated April 3, 2008 before the Achieve Information Request was sent and before the Jackson Letter was certified. As noted the information sought from Flores in March 2008 had nothing to do with a “partnership” between USDLA and Achieve.



First, it is difficult to grasp what in the Flores Email, as selectively quoted by the Administrator, actually conflicts with Jackson's sworn statements concerning the absence of any Achieve/USDLA partnership. Flores makes no reference to "partnership" in the quoted section of the Email. And, again, since the questions posed to Flores had nothing to do with such a purported "partnership", this is not surprising. Flores was not asked, and therefore he said nothing, about any purported Achieve/USDLA partnership or the meaning of such statements that appear on the USDLA website.

Again, as noted above, the Administrator did not produce the Flores Email and it was withheld from Achieve in response to the FOIA request. Fortunately, Achieve was able to obtain it. Here is what the Administrator elides:

USDLA **in partnership** with its Board of Directors solicits donations in support of its Digital Divide Fund.... In particular Polycom, Tandberg, Aretha and Achieve are just a few. As we solicit donations from philanthropic groups or private donations we work with districts attempting to support what the e rate monies allow them to do. Achieve as a Massachusetts based company has taken advantage of this opportunity. All of the grants we do award are always subject to funding. **All partners** know this before moving forward. I hope this helps you out. If you need more information please do not hesitate to call me.

Exhibit 2 (emphasis supplied). "All partners...." Polycom, Tandberg, Aretha, Achieve, the school districts, everyone with whom USDLA and Flores comes into contact is apparently a "partner." Indeed, in Flores' terminology, USDLA even "partners" with its own Board of Directors! Thus, this broad non-legal usage of the term "partner" was used **twice** by Flores in the response to the very "information request" that the Administrator relies on in rejecting Jackson's sworn statements and the Achieve Appeals concerning the absence of any "partnership" regardless of what USDLA happens to say on its website. And Flores' broad usage of "partner" was known to USAC-SLD in April, 2008 several months before the Achieve Information Request, months before the COMADS, and 2 years before the Administrator (selectively quoting the same Flores Email), misleadingly stated that it conflicted with Achieve's argument that it had no partnership with USDLA.

In its Appeals, Achieve pointed out that the annual reports on the USDLA website relied on in the COMADS used the term "partnership" with respect to various other relationships with other companies. Even though the Administrator had the Flores Email in hand and knew that the term "partner" had been used precisely in this broad manner in that very Email, the AdDecs do not mention Flores' broad and non-legal use of the word "partner" at all, and elide it from the text of the Flores Email set out in the text of the AdDecs.

As stated in the Achieve Appeals, USDLA materials are replete with the broad use of the word "partner". For example, in several grant letters sent to the school districts in paragraph 2, USDLA states as follows:

Your project represents that specific goal and we [USDLA] welcome the opportunity to build this very important **partnership** with Springfield Public Schools District.

Exhibit 8 (emphasis supplied).

In the USDLA's 2004 Annual Report Exhibit 9 (cited by the Administrator) there are the following statements concerning "partnerships":

Page 1: "New initiatives which included new partnerships...."

"Continued progress on various new policies regarding membership, dues, legal and partnership issues."

Page 2: "Partnerships: Have created numerous partnerships for the association, which have increased benefits and level of membership services, e.g. journal, conference discounts and networking opportunities."

"Conferences: Continued to pursue new partnerships and venues."

Page 3: "NSU Partnerships: Rental Reimbursement/Services Reimbursement/Journal"

In the 2005 Annual Report "partnership" appears as follows:

Page 2: "State Chapter: Continued progress on various new policies regarding membership, dues, legal and partnership issues:

"Partnerships: Have created numerous partnerships for the association, which have increased benefits and level of membership services, e.g. journal, conference discounts and networking opportunities."

"Conferences: USDLA sponsored partnerships: [list of conferences]"

In the USDLA's 2005 USDLA Annual Report (Exhibit 10), the USDLA also repeatedly uses the word "partnership" in its press releases. For example, its 2009 press releases (available at <http://www.usdla.org/2009pressrelease.php>) indicate that USDLA has formed 3 different "partnerships" in connection with its website.

In short, there is no basis for concluding simply because the USDLA website uses the word "partnership" that any type of formal or informal agreement is intended. Moreover, the complete failure to actually inquire of Flores and USDLA for almost 2 years after first receiving the Jackson Letter and its detailed and sworn denial of any kind of partnership indicates that the USAC-SLD and the Administrator are not fairly and objectively attempting to find facts. As Flores states in his June 21, 2010 statement:

This letter is to inform USAC that Achieve Telecom Network of Massachusetts has never been a member or sponsor of USDLA nor has Achieve Telecom ever been a partner of USDLA. The term partner as cited by USAC in USDLA reports was used to infer that a common goal existed between both entities. That goal was to promote the application and development of distance learning opportunities to support various school district distance learning projects. Specifically, any Achieve related school district that received any monetary support from USDLA was the result of a review of the school's grant application submitted by the district to USDLA. Hence, any suggestion that USDLA and Achieve were partners is a total misrepresentation."

Exhibit 6.

### **III. Achieve Did Not Market or Guarantee a No-Fee Service in its Bid Materials or in any other Manner**

In each of the COMADs and in the FCDL, USAC-SLD alleged that:

Achieve's bids to applicants indicate that Achieve markets their service to applicants as a no cost service because Achieve is able to guarantee applicants that they will receive USDLA grants....

Each COMAD describes this alleged guaranteed grant as a rebate or waiver of the applicant's share of the costs. Each COMAD then concludes on the basis of this alleged guaranteed grant as follows:

The information obtained shows that Achieve guarantees that the applicants will receive a grant from the USDLA to use to pay the applicant's share for the Achieve funding requests. Because Achieve is able to guarantee this grant, Achieve is providing the applicants with a rebate.... Furthermore, Achieve has an unfair competitive advantage based on violating the rule that applicants not receive rebates....

Exhibit 11, COMAD letter dated September 8, 2008 to Springfield Public Schools, FRN 1207981, Page 5. The Appeals filed by Achieve and each of the school districts in response to these COMADs fully and completely rebutted these allegations. As discussed below, sworn statements from Achieve and representatives of each school district categorically denied that Achieve ever "guaranteed" any grant from USDLA. Exhibit 12 - School District Representatives Statements. Achieve bid documents were filed with its Appeals that establish that no such "guarantee" was offered or marketed. (Exhibit 1 includes 2004 Somerville 470 as an example; other 470s follow the same format and are available for review).

In response to these sworn statements and materials, the Administrator finds as follows:

SCR conducted an investigation into Achieve's practices and determined that Achieve was marketing its services as fully funded and was guaranteeing that USDLA would provide grants to E-Rate applicants to cover the non-discounted portion of costs. [1] Statements were provided to SLD that support the finding that Achieve offered to help E-Rate applicants secure grants that would cover their non-discounted portion of costs. [2] SLD has also received documentation from E-Rate applicants, who selected Achieve as their service provider that supports its finding that Achieve was authorized to speak on behalf of USDLA regarding its grants. [3] There is ample evidence to support SLD's finding that Achieve was able to guarantee USDLA grants to cover E-Rate applicants' non-discounted costs and thus, provide fully funded services.

AdDec [Chelsea 1381110, page 4-5 bracketed numbers supplied]. The Administrator also states:

SLD disagrees with the assertion that Achieve does not market its AchieveXpress service as a no-cost service. As explained above, SCR inquired into Achieve's practices and relationship with USDLA. It was determined that Achieve was offering its services as fully funded or at no-cost to E-Rate applicants in violation of program rules. [4] Although USAC did not receive any documents from Achieve or Chelsea regarding Achieve's practice of offering fully funded services, USAC was provided such documentation from other E-Rate applicants who selected Achieve as their service provider.

AdDec [Chelsea 1381110, page 6 bracketed numbers supplied].<sup>3</sup>

The Administrator's finding – that Achieve marketed its services as fully funded and guaranteed USDLA grants – literally has nothing whatsoever supporting it. Not only does the Administrator never even address the mountain of contrary evidence – the sworn statements from school district representatives and Jackson and all of the relevant Achieve bid documents – but the “evidence” cited by the Administrator is non-existent. First, the Administrator cites the undisputed proposition that “Achieve offered to help E-Rate applicants secure grants that would cover their non-discounted portion of costs.” [1] Offering to help with grants is hardly marketing a fully funded service or guaranteeing a grant. (Attached to the Jackson Declaration (Exhibit 16) is an example of the grant information Achieve provided to customers, information by no means limited to USDLA grants).

Second, the Administrator refers to “documentation” that indicates that Achieve “was authorized to speak on behalf of USDLA regarding its grants.” [2] This “documentation” is not identified in 9 of the 13 AdDecs at issue. However, in the 4 Somerville AdDecs the Administrator provides this “documentation”:

For example, Joy Jackson (President, Achieve) makes the following statements to Somerville:

- “You still have one year left on the grant from the USDLA however, next year you will need to apply for the grant again for another three years.” January 10, 2007 E-mail from Joy Jackson (Achieve) to Anne-Marie Fiore (Somerville).
- “You are good on the [USDLA] grant for next year as well.” January 25, 2007 E-mail from Joy Jackson (Achieve) to Anne-Marie Fiore (Somerville).

AdDec [Somerville, 1175002 at page 5]. Apparently, for the Administrator these statements by Jackson somehow prove that Achieve is speaking on behalf of USDLA which, in turn, proves that Achieve marketed its services as fully funded and guaranteed USDLA grants.

Such a set of inferences based on this “documentation” is not reasonable. First, both Jackson emails simply state undisputed facts known at that time to Jackson, to the email recipient, Fiore, and to USAC and SLD. As the Administrator found in the same Somerville AdDecs in which this “documentation” is cited, USDLA awarded Somerville a three-year grant in August, 2005. AdDec [Somerville, 1175002 at page 3 citing August 31, 2005 letter from Flores]. Thus, Jackson's statements made in January 2007 simply reflect this fact. Second, Jackson's email actually states that after the 3-year grant expires, Somerville will have to “apply for the grant again....” The Administrator, however, on the basis of these non-controversial statements concludes:

These statements support SLD's finding that Achieve was able to promise Somerville that it would receive future grants from USDLA to cover its non-discounted portion of costs.

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<sup>3</sup> In the two AdDecs concerning Chelsea, the Administrator states that USAC received no documents from Achieve or Chelsea indicating that Achieve offered fully funded services. In the three AdDecs concerning Brockton, this disclaimer ran to documents from Achieve or Brockton. In the four Somerville AdDecs, the disclaimer ran to documents from Achieve or Somerville. Only in the four Springfield AdDecs does the Administrator actually refer to any documents for support of the finding that Achieve offered a fully funded service. This Springfield-specific finding is discussed in detail below.

AdDec [Somerville, 1175002 at page 5]. This conclusion is patently unreasonable based on this evidence. Thus, the only "documentation" cited in any of the AdDecs does not indicate at all that Achieve could or did speak on USDLA's behalf or in any other way could or did guarantee a USDLA grant.<sup>4</sup>

There is nothing further offered by the Administrator to counter the mountain of evidence that Achieve did not market a fully funded service or guarantee USDLA grants. The Administrator claims there is "ample evidence" [3] but offers absolutely none. The Administrator admits that he did not receive any documents from Chelsea, Somerville or Brockton to support this finding.<sup>5</sup> Finally, the Administrator does not even mention the sworn statements by school representatives regarding this finding. For example, Springfield's Robert G. Hamel stated under oath as follows:

Achieve's oral and written presentations to the District in connection with the Applications did not represent in any way that Achieve was offering a service that would be "no cost" to the District. Achieve did inform the District of the opportunity to apply for a grant from [USDLA] to cover the District's share of the cost of the services ("District Share"), covered by the applications ("Grant"). Achieve also generally noted that there were other potential sources of such grants. However, Achieve did not represent either orally or in writing to the District, that if the District selected Achieve as its service provider and applied for such a Grant from USDLA that approval of the Grant by USDLA was guaranteed. Achieve did not present an automatic Grant from USDLA as part of the Achieve service proposal made to the District. Furthermore, USDLA specified that the Grant award was not contingent upon the selection of Achieve for the provision of services to the District.

Exhibit 13. Hamel Declaration, Para. 4. Similar sworn statements were submitted from the representatives of the other school districts. Exhibit 12. In addition, each bid document submitted by Achieve to each school district was filed with the Achieve appeals. Exhibit 1. The Administrator refers to none of this material.

In sum, the finding that Achieve marketed a fully funded service or guaranteed USDLA grants is wholly without any record support.

#### **IV. USDLA Grants were Not Earmarked for Achieve Services**

Based on its unsustainable findings that Achieve was a member of USDLA, had some form of partnership with it, could and did guarantee USDLA grants to its customers and thereby marketed a "no cost" service, the Administrator also found that USDLA's grants were earmarked for Achieve customers. In further support of this finding the Administrator also cited a curious piece of evidence. In the case of each school district, the Administrator noted that the USDLA grant award letter identified Achieve even though the *title* of that school district's USDLA grant application did not refer to Achieve or its services. Based on this curious "fact"<sup>6</sup>, the Administrator surmised that USDLA "appears to use a standard form letter" that has

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<sup>4</sup> As noted this "documentation" was provided to SLD by Somerville. Although the Administrator refers to this Somerville material, there is no reference at all to the materials submitted by Somerville in its appeal including the sworn statement by Joseph Mastrocola (Exhibit 12) attesting to the fact that Achieve never offered a "no cost" service and never guaranteed a USDLA grant.

<sup>5</sup> Indeed, the only other evidence cited for this finding is a provision in two Springfield contracts. This Springfield-specific evidence is discussed in below. As is made clear below, nothing in the Springfield contracts have to do with marketing fully funded services or guaranteeing USDLA grants.

<sup>6</sup> As discussed below, in the case of Somerville it is not true that the title to Somerville's USDLA grant application does not refer to Achieve.

“Achieve” and its services embedded in it. The Administrator then concluded that this “form letter” in turn supported its finding that USDLA grants go only to Achieve’s customers. The Administrator appeared to take this inferential chain quite seriously, citing it **twice** in every single AdDec and expressly noting that this “evidence” provides “further support to the claim that the USDLA grants were earmarked for Achieve’s services.” AdDec [Chelsea 1381110, page 5.<sup>7</sup>]

Of course, the title of a USDLA grant application is just that: a title. Presumably, the Administrator would also have examined the actual content of the grant application to see if inside the body of that application Achieve is identified as the service provider. Astoundingly, the Administrator either did not do so, or did so and then ignored that content in making this remarkable finding.

Take the case of Springfield’s grant application. In each of the four Springfield AdDecs, the Administrator twice states:

The August 2005, February 2007, and January 2008 USDLA letters to Springfield reaffirming the grants referred to the projects as the “AchieveXpress Telecommunications distance learning project,” despite the fact that Springfield had titled it the “Springfield Public Schools District Digital Divide Project” in its USDLA grant application.

AdDec [Springfield 1207981 at page 5-6, repeated at page 2-3 virtually verbatim with identical citations to USDLA grant letters]. Interestingly, there is no citation by the Administrator to any Springfield USDLA grant application itself. Achieve in its consolidated appeals of the Springfield COMADs had submitted two of Springfield’s actual USDLA grant applications. So the Administrator had these Springfield grant applications available for review. In both grant applications (one dated February 14, 2005, the other dated January 17, 2007), the title of the grant applications (appearing on the top of the first page) is indeed: “Project Title: Springfield Public Schools Digital Divide Project.” But in both applications on the same first page appears the following statement:

Brief Description of Project:

... SPS has contracted for this service with an eligible telecommunications provider, Achieve Telecom Network of MA, LLC., who offers a distance learning transmission service, called **AchieveXpress**.

Exhibit 14 (emphasis in original).

It would be difficult to imagine a more arbitrary and capricious finding. Not only would a reasonable fact-finder not rely on a title alone but it is nothing less than astounding that the Administrator, ***in possession of the actual Springfield grant applications that completely confound its finding, does not cite to them at all.***

This finding is even more remarkable because, as the Administrator acknowledges, other grant award letters from USDLA expressly state that:

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<sup>7</sup> The purported distinction between the title of the school district’s USDLA grant application and USDLA’s language in its grant award letter is not noted in any COMAD. For that reason, it is not addressed by any Achieve or school district appeal. Again, it reflects the forensic fact-finding of the Administrator after delaying decision on these numerous appeals for 18 months.

While you may have been referred to USDLA by a vendor for this project, please understand that our grant is to your school district and is not dependent upon your selection of any specific vendor.

Exhibit 15. June 27, 2005 Flores letter to Kingston, Chelsea Superintendent of Schools.

To appreciate how irrational the Administrator's findings are in this regard consider the following. For each school district the Administrator cites the title of that district's USDLA grant application and then the language of the USDLA grant letter. As noted above, for Springfield the title does not contain any reference to Achieve (while of course the application does). But in one case, the Administrator does not appear to have actually even read the title used by the school district on which his finding rests. Here is the Administrator's discussion of this point as set out in each of the four Somerville AdDecs (and twice in each one):

In addition, the 2005 and 2008 award letters from USDLA to Somerville specifically state that the grant was to cover "Achieve Xpress Telecommunications distance learning project" despite the fact that Somerville had titled its project the "Somerville Public Schools/AchieveExpress Somerville Bridging the Digital Divide Project" in its grant application.

AdDec [Somerville 1688549 page 2-3, repeated virtually verbatim at page 5 again with no citation to the actual grant applications [emphasis supplied]. In the case of Somerville, then, the Administrator seems unaware that there is not even any significant discrepancy between the *title* of the grant application and the grant award letter.

In sum, this subsidiary finding has no rational basis and should be completely rejected and reversed.

**V. Incorrect Tax Reporting by USDLA has Nothing to do with Achieve: Grants were Paid by USDLA Checks and Achieve is not Responsible for USDLA's Tax Accounting or Tax Returns**

Finally, in all of the AdDecs the Administrator, drawing inferences from publicly available tax filings by USDLA, surmises that grant monies were not actually paid by USDLA's Digital Divide Fund to Achieve in connection with USDLA's various grants. USDLA's tax filings were not mentioned or cited in any of the COMADs though all of the tax filings cited by the Administrator were publicly available to USAC-SLD at the time the COMADs issued. In addition, at no time before or after the issuance of these COMADs were any information requests concerning USDLA's tax filings put to Achieve or, apparently, to USDLA itself. The review of these tax filings and the inferences drawn from them reflect the forensic work of the Administrator alone during the 18 months that Achieve's appeals were pending. To repeat: at no time was Achieve asked to provide any evidence that USDLA's Digital Divide Fund actually paid the grant monies pursuant to the identified district grants.

Attached as Exhibit 16 is a complete record of Achieve's invoices to USDLA, copies of many of the cancelled checks that evidence the payment of each invoice, and an affidavit from Joy Jackson, President of Achieve, that attests to the validity of the invoice record and the cancelled checks.<sup>8</sup> This evidence completely contradicts the inference drawn by the Administrator from the review of USDLA's tax filings. And this evidence was available and could

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<sup>8</sup> Achieve has contacted the relevant banking institutions and is gathering a complete record of all checks it received from USDLA over the relevant time period. Achieve expressly reserves the right to supplement the record on appeal, including with a complete set of all of the relevant cancelled checks once it receives them.

have been, and would have been, produced if requested at any time during the 18 months of the Administrator's consideration of Achieve's appeal.

Achieve has no independent explanation of USDLA's tax accounting or its filings. Upon inquiry to USDLA, its accountant has provided a statement. Exhibit 17. USDLA's accountant states:

Based upon [my] understanding it was determined that the charitable intent of the Donors was not USDLA but the Digital Divide Fund and the school districts. It was also my understanding that the function of USDLA was to receive Distance Learning funds for disbursement on behalf of school districts in connection with approved grant applications for Distance Learning projects and that such activity has no effect on the financial position or the operating results of USDLA. Accordingly, no revenues or expenses were reflected by USDLA in its financial statements or its tax returns.

Achieve was never consulted by USDLA in advance of any of these tax filings, and was not aware of these filings until the Administrator referenced them in the AdDecs.<sup>9</sup> Moreover, neither the relevant school districts nor Achieve is any kind of guarantor of the accuracy of USDLA's tax filings. Inquiry should have been made by USAC-SLD of USDLA concerning these issues. But the inference drawn by the Administrator – that the grant monies were not paid to Achieve – is manifestly wrong and without any basis.

## **Part 2: The Somerville and Springfield AdDecs Each Contain a Separate Finding that is Unsustainable**

### **I. The Administrator's AdDecs in the Somerville Dockets Unreasonably Rely on a Letter Superseded by Somerville's Subsequent Detailed Appeal**

In the four AdDecs involving Somerville, but in no other AdDecs, the Administrator specifically relied on a statement in a filing made by Somerville to support the finding that Achieve marketed a "no cost" service. The Administrator states:

And in further support of SLD's determination that Achieve marketed its services as "fully funded," Somerville asserts in its appeal: "It is the City's position that any and all funding issues are the result of actions of Achieve Telecom and its commitment that the City would bear no-costs for the services provided by Achieve Telecom" (emphasis added). Somerville's admission supports SLD's finding that Achieve marketed its services as fully funded or at no-cost to Somerville.

AdDec [Somerville 1688549 page 6-7, repeated verbatim in each Somerville AdDec]. In light of the full record of Somerville's appeals before the Administrator, any reliance on this statement is unreasonable.

On September 8, 2008 USAC-SLD issued a COMAD regarding the Somerville Funding Year 2004. On November 7, 2008 Somerville's City Solicitor John G. Gannon sent a 1-page letter in response to this COMAD containing the sentence quoted by the Administrator in the above portion of the Somerville AdDecs. Exhibit 18. Gannon did not submit any affidavits or other material in support of the "City's position." It is a simple conclusory statement in a lawyer's letter.

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<sup>9</sup> Review of USDLA's website describing its Digital Divide Fund (<http://www.usdla.org/index.php?cid=158>) makes clear beyond peradventure that this Fund is a USDLA Fund and that contributions to it are tax deductible to the donors.



On the same day that the Administrator received Gannon's letter, Achieve submitted its appeal of the Somerville COMAD. Attached to that appeal was the Jackson Letter in which Jackson under the penalty of perjury states that Achieve did not market its services as either fully funded or no-cost. In addition, the Achieve bid documents submitted to Somerville (which contain no statement of any kind supportive of Gannon's conclusory statement) were also provided.

On January 14, 2009 two additional Somerville COMADs (for Funding Years 2006 and 2007) were issued.<sup>10</sup> On March 13, 2009 the City of Somerville filed an appeal of these COMADs. This appeal was again filed by Gannon as the City Solicitor. In this appeal Somerville submitted sworn statements from City representatives to the effect that Achieve had never offered or marketed a fully funded or no-cost service. For example, James Halloran, Somerville's Director of Information Technology, swore under the penalty of perjury that:

Achieve's oral and written presentations to the Somerville [sic] in connection with the Applications did not represent *in any way* that Achieve was offering a service that would be "no cost" to the Somerville [sic].

Exhibit 19. March 5, 2009 Halloran Declaration at Para. 4 (emphasis supplied). Similar sworn statements were made by other Somerville representatives. Exhibit 19. March 12, 2009 Declaration of Kate Ashton at Para. 6; March 6, 2009 Declaration of Joseph Mastrocola at Para. 4, 6. All of this evidence was submitted to the Administrator by Gannon, the City Solicitor, after his November 7, 2008 letter.

Nonetheless, in the AdDecs denying Achieve's appeals in the Somerville dockets, the Administrator cites to the single conclusory sentence in the Gannon letter totally ignoring all of the evidence submitted by Achieve and Somerville itself that clearly superceded and effectively withdrew Gannon's unsupported statement. Moreover, at no time during the 18 months in which the Administrator considered the Achieve and Somerville appeals was any further inquiry made of Somerville regarding whether the earlier letter submission had been essentially withdrawn when Somerville prepared and filed its substantive appeal.

For the Administrator to cite the Gannon letter in these circumstances is arbitrary and capricious and the conclusory statement contained in the earlier Gannon letter manifestly does not support any finding made by the Administrator in the Somerville AdDecs.<sup>11</sup>

## **II. The Administrator's Finding Based on Language in the Springfield Contracts is not Reasonable**

The Administrator made a finding specific to the Springfield appeals based on language in the October 25, 2005 and August 3, 2007 Contracts between Achieve and Springfield. The language states that "It is expressly agreed and understood that in no event shall the City have

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<sup>10</sup> Even though SLD had received the Gannon letter with its conclusory statement before issuing these COMADs – a statement that the Administrator 18 months later would cite as evidence of a program violation – these COMADs make no mention of that letter. For that reason, the latter substantive appeal also does not mention the earlier 1-page Gannon letter. It was apparently considered to be of no weight.

<sup>11</sup> In act, it is quite revealing that the Administrator does not cite the Gannon letter in the two AdDecs issued directly in response to Somerville's own March 13, 2009 substantive appeal. These AdDecs sent directly to Gannon, the City Solicitor, do not mention his earlier letter at all. How or why the Administrator thought that Gannon's November 7, 2008 conclusory statement was "further support" for the denial of Achieve's appeal but not further support for the denial of Somerville's appeal of the same COMADs is not explained. Presumably, the Administrator realized that sending a denial to Gannon of Somerville's substantive appeal which denial was based on Gannon's own earlier unsupported letter directly contradicted by his substantive appeal might appear unreasonable.

any financial liability under this Agreement...” Exhibit 20 Springfield Contracts, § 3.A The Administrator treats this language as evidence that Achieve marketed its services as “fully funded” and was able to “guarantee” grants by USDLA.

This language is not based on any marketing by Achieve of no cost services or guarantees of grants. Achieve made no such claims. Nor did Achieve ever propose or tender this contractual language. Exhibit 21- Gatto Declaration. The language was necessitated by the unique and precarious financial status of Springfield.

Springfield was under the supervision of a Finance Control Board appointed by the Governor of Massachusetts, therefore, the Springfield School District needed the approval of that Board in order to enter into the Contract with Achieve. By contrast, Brockton, Chelsea and Somerville were not under similar financial supervision, and no language of this kind appears in their agreements with Achieve. Brockton elected to use Achieve’s tariff as well as Achieve’s MA state contract for its telecommunications service so no additional contract was required. Chelsea also used Achieve’s MA state contract for its telecommunications service but also extended a contract from the City of Chelsea. Somerville signed a multi-year (3) contract with Achieve for telecommunications service from July 1, 2004 through June 30, 2007.

The Administrator has misconstrued this “no liability” language while ignoring altogether the dire financial condition of Springfield and the constraints under which it was contracting with Achieve. That condition was well known, or should have been well known, to SLD and its representatives as a result of the extensive reviews of Springfield’s E-Rate submissions and the Selective Review Process conducted by SLD.

The Administrator has also ignored direct affirmative evidence from Springfield that Achieve at no time offered Springfield a “no cost” service or guarantees of a USDLA grant.<sup>12</sup> Robert Hamel was Assistant Superintendent of the Springfield Public Schools. He was regularly involved in the E-Rate Program application and review process and in meetings and interaction with Achieve regarding its offer of services. Mr. Hamel submitted an affidavit in connection with Springfield’s appeal of the COMADs. In it he declares unequivocally that “Achieve’s oral and written presentations did not represent in any way that Achieve was offering a service that would be ‘no cost’ to the District”. Mr. Hamel also unambiguously states that “Achieve did not represent, either orally or in writing to the District, that if the District selected Achieve as its service provider and applied for a Grant from USDLA, that approval of the Grant by USDLA was guaranteed.” Exhibit 13 – Hamel’s Declaration; Paragraph Number 4. Furthermore, in connection with the Selective Review Process conducted by SLD, Mr. Hamel actually submitted to SLD copies of the contracts during review of the Form 471 applications. There was never any objection by SLD to the language now cited by the Administrator.

One last point should be made in response to the Administrator’s citation of this language. Wrongly treating it as evidence of Achieve’s “no cost” marketing, the Administrator then asserts that this no cost approach “undoubtedly provided Achieve an unfair competitive advantage”, in violation of the FCC’s open and fair bidding requirements. The Administrator should have focused on § 1.A of the Springfield/Achieve Contracts. In each of the three Contracts, § 1.A states that “the Vendor shall... provide Technology Services in accordance with the terms of this Agreement **and pursuant to Commonwealth of Massachusetts State Contract(s) identified as: MA (OSD) ITS07.**

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<sup>12</sup> In fact funding from both SLD and USDLA had been secured before the execution of the first two Achieve/Springfield Contracts of October 25, 2005 and January 17, 2007. Funding had not been secured at the time of execution of the third Contract on August 3, 2007.

The Massachusetts State Contract so identified is a Master Contract under a tariff approved by the Massachusetts Department of Telecommunications and Energy (now called the "Department of Telecommunications and Cable") and available to municipalities and school districts in the Commonwealth for contracting with a designated list of qualified and approved service providers. Achieve was on that list of providers in Massachusetts State Contract ITS07. Selection of Achieve or another approved vendor for the provision of services under the Master Contract does not require an additional competitive bidding process. Springfield lawfully contracted with Achieve pursuant to the Master Contract and so noted that on each of its 470 and 471 submissions for these services. There was therefore no need for Achieve to advantage itself with the "no liability" language in the Springfield/Achieve Contract. That language was solely at the behest and for the protection of an impoverished Springfield and not for the benefit of Achieve at the expense of competing providers.

The Administrator has 'overread' a single clause of the Springfield/Achieve Contracts to support findings that disregard the special financial circumstances of Springfield, are flatly contradicted by Mr. Hamel's testimony, and show no understanding of the Massachusetts Master State Contract and the legitimate selection of Achieve as the service provider thereunder.

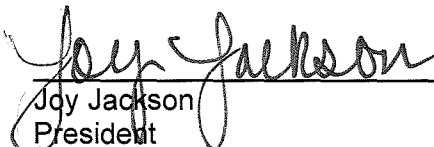
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### **CONCLUSION AND REQUEST FOR RELIEF**

The Administrator denied Achieve's Appeals of the twelve COMADs and the FCDL without any rational basis. As a consequence of SLD's initial actions and the Administrator's extended delay before unreasonable upholding them, Achieve's business has been effectively destroyed. For all of the reasons set out above, Achieve hereby respectfully requests that the Federal Communications Commission act expeditiously on the Request for Review, grant this appeal and specifically:

1. Reverse the Administrator's denials of the Achieve Appeals in all thirteen (13) Dockets identified above;
2. Cancel the COMADs and rescind the FCDL; and
3. Grant any and all appropriate relief including directing SLD to immediately pay all outstanding Achieve invoices that have not been paid since the issuance of the first COMAD on September 8, 2008.

Respectfully submitted,

  
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Joy Jackson  
President  
Achieve Telecom Network of MA, LLC.

A copy of this Request together with all of the exhibits was served today, June 25, 2010 by Federal Express to the Administrator.